1990

Darrin Lamar Pelton v. Utah : Petition for Writ of Certiorari

Utah Supreme Court

R. Paul Van Dam; attorney general; Charlene Barlow; assistant attorney general; attorneys for appellee.
Elizabeth A. Bowman; Salt Lake Legal Defender Association; attorney for appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

DARRIN LAMAR PELTON,	:	
Petitioner/Appellant,	:	
v.	:	
THE STATE OF UTAH,	:	Case No. 900589 Priority No. 2
Respondent/Appellee.	:	

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DARRIN LAMAR PELTON,	:	Case No. 890509-CA Priority No. 2
Defendant/Appellant.	:	

PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals overlook the element of causation by basing liability on the fact that the defendant knew he would be the triggering mechanism for the drug transaction (as opposed to actually being the triggering mechanism)?

2. Did the Court of Appeals erroneously uphold the "drug arrangement" statute (which is unconstitutional as applied to the facts of this case because of the undercover agent's intervening conduct)?

TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS

Amendment XIV to the Constitution of the United States provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Article I, Section 7 of the Constitution of Utah provides:

> **Sec. 7. [Due process of law.]**
> No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Ann. § 58-37-8 provides in pertinent part:

> **58-37-8. Prohibited acts--Penalties [Effective until July 1, 1990].**
> (1) Prohibited acts A--Penalties:
> (a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:
>
> . . . . .
>
> (ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;
>
> . . . . .
>
> (iv) possess a controlled or counterfeit substance with intent to distribute.

IN THE SUPREME COURT OF THE STATE OF UTAH

DARRIN LAMAR PELTON,	:	
Petitioner/Appellant,	:	
v.	:	
THE STATE OF UTAH,	:	Case No. Priority No. 2
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THE STATE OF UTAH,	:	
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PETITION FOR WRIT OF CERTIORARI TO
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OPINION BELOW

The opinion of the Court of Appeals in State v. Pelton, 147 Utah Adv. Rep. 36 (Utah App. 1990), is attached hereto as Appendix A. On November 14, 1990, Petitioner timely filed a Petition for Rehearing in the Court of Appeals. On November 28, 1990, the Court of Appeals denied Appellant's Petition for Rehearing. A copy of that Court's order denying the Petition for Rehearing is attached hereto as Appendix B.

JURISDICTION

The Utah Court of Appeals filed its opinion on November 9, 1990. Appellant filed his Petition for Rehearing on November 14, 1990 and it was denied on November 28, 1990. The Petition for Rehearing tolled the period in which this Petition for Writ of Certiorari must be filed. Utah R. App. P. 48(c). This Petition for Writ of Certiorari is therefore timely filed. Utah R. App. P. 48. Jurisdiction is pursuant to Utah Code Ann. §78-2-2(5) (Supp. 1988) and Utah Code Ann. §78-2-2(3)(a) (Supp. 1988).

STATEMENT OF THE CASE

This is an appeal from a judgment and conviction for Offering, Agreeing, Consent, or Arranging to Distribute a Controlled Substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1989) (effective until July 1, 1990). After a bench trial held June 13, 1989, Mr. Pelton was convicted as charged by the Honorable Homer F. Wilkinson, Judge, presiding in the Third Judicial District Court in and for Salt Lake County, State of Utah.

STATEMENT OF THE FACTS

The State charged Mr. Pelton with one count of Offering, Agreeing, Consenting, or Arranging to Distribute a Controlled Substance, to wit: cocaine, a second degree felony. The facts pertinent to this case are stated in the Court of Appeals' decision and, where appropriate, in the argument section of this petition.

SUMMARY OF THE ARGUMENT

Proof of causation is a necessary element for a criminal conviction. The State never proved that the actions of the Petitioner, Darrin Pelton, provided the necessary nexus for a drug transaction. Two separate sets of acts should be considered. In the first, Petitioner Pelton's conduct--even if considered improper--should not be deemed criminal because of the intervening conduct of the involved undercover agent. Petitioner cannot be considered a "middleman" because he never linked the agent to the next person involved in the drug transaction. Secondly, the drug transaction began anew after the agent told his informant to contact a middleman (not the Petitioner) who, in turn, contacted a drug dealer. The Petitioner was not involved in the second transaction.

Utah's appellate courts have found individuals liable if they "acted" in furtherance of a drug transaction. The prohibition against "any act," however, does not contemplate intervening conduct by an agent which renders harmless the initial "culpable" conduct of the involved individual. By failing to account for the necessary nexus or lack thereof, the Court of Appeals' decision did not properly address the element of causation in an intended drug transaction.

ARGUMENT

POINT I. THE DECISION OF THE COURT OF APPEALS DID NOT CONSIDER THE ELEMENT OF CAUSATION

The Court of Appeals erroneously concluded that the conduct of the Petitioner, Darrin Pelton, was "one link in a chain

of events . . . which eventually led to the sale of cocaine." 147 Utah Adv. Rep. at 36. Petitioner Pelton did not constitute a necessary link. The "link," if any, broke when the undercover agent voluntarily terminated Mr. Pelton's involvement. Even if the Court of Appeals correctly concluded that Mr. Pelton acted with the requisite criminal intent, his behavior should not have been deemed criminal without proof of the element of causation. Causation was never proven.

Utah appellate courts have decided countless cases involving the sale of drugs, but they have never specifically addressed exactly <u>when</u>, if ever, the intervening actions of an agent will release the initial "participants" from criminal liability. (i.e. should an involved individual <u>always</u> be considered liable, as the Court of Appeals decision implies, no matter what the undercover agent may later do or say to call off the planned "sting" operation?) At what point will the conduct of the agent preclude a finding of causation?

Petitioner concedes that "middlemen" in the sale of drugs can be held accountable for their involvement in the transaction. However, "middlemen" no longer exist if an agent ends an intended transaction and then begins <u>another</u> transaction on his own. In such a scenerio, as occurred in the case at bar, the "middleman" of the initial transaction suddenly becomes the <u>last</u> link in an ill-advised (but noncriminal) series of events.

Petitioner Pelton met an agent at a meeting place and told him, in substance, to go to a 7-Eleven where they would call a man and wait for the cocaine. The Court of Appeals noted that "the trial court could properly conclude that defendant [Pelton] knew that he would be the triggering mechanism in bringing [agent] Acosta and Paco together when he had Acosta drive to the 7-11 store, and that he also knew the transaction involved the sale of cocaine." Slip. op. at 3. Knowing that one would be the triggering mechanism as opposed to actually being the triggering mechanism are two very different concepts. Causation is shown only by proof of the latter situation.

If Mr. Pelton had introduced the agent to the cocaine dealer, the "link" would have continued with Mr. Pelton remaining liable for his actions. However, because the agent ended Mr. Pelton's involvement at the 7-Eleven, and because the agent initiated a new transaction by telling his informant to contact the real "middleman," Lorraine Coates, who, in turn, introduced the agent to the cocaine dealer, causation existed only for the second transaction (with Coates--not Pelton--liable for "arranging" the transaction). No nexus linked the initial transaction involving Mr. Pelton with the subsequent transaction involving Ms. Coates because of the intervening conduct of the agent.

If other courts follow the Court of Appeals' decision in the future (as undoubtedly will be the case with the ever present nature of drug transactions), the decision will allow an agent to arbitrarily end an intial transaction with one participant, begin

another transaction an hour, a day, or a week later with another participant, and then hold the initial participant liable for the second transaction. Greater guidelines must be incorporated into the Court of Appeals' decision on the element of causation. Nothing stated in existing opinions specifically address the outer limits of causation for drug transactions. Most opinions have stated only what is permissible. See, e.g., State v. Ontiveros, 674 P.2d 103 (Utah 1983).

POINT II. THE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER'S CASE

Closely related to the arguments summarized above are arguments pertaining to the all encompassing nature of the applicable statute, Utah Code Ann. § 58-37-8. The statute prohibits any person from "agreeing, consenting, offering, arranging, or negotiating" the distribution of a controlled substance. While these five activities may be constitutionally proscribed, see State v. Harrison, 601 P.2d 922 (Utah 1979), the type of proscribed conduct which falls under each activity remains unclear.

Prior decisions have prohibited "any act" taken in furtherance of arranging to distribute . . . a . . . controlled substance . . . ." 147 Utah Adv. Rep. at 36; see also State v. Gray, 717 P.2d 1313 (Utah 1986)) ("any witting or intentional lending of aid in the distribution of drugs, in whatever form the aid takes, is proscribed by the act"). However, an analysis addressing the unconstitutionality of the "drug" statute as applied to the

potentially intervening actions of the undercover agent has never been conducted by Utah's appellate courts. Absent such an analysis, Petitioner submits that the nebulous definition did not give him adequate notice of the proscribed conduct and was unconstitutional as applied to him because "any act" did not contemplete intervening conduct.

CONCLUSION

Mr. Pelton respectfully requests this Court to grant his Petition for Writ of Certiorari to review the issues addressed herein.

SUBMITTED this 28th day of December, 1990.

ELIZABETH A. BOWMAN
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, ELIZABETH A. BOWMAN, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 28th day of December, 1990.

ELIZABETH A. BOWMAN

DELIVERED by _____ this _____ day of December, 1990.

_____

APPENDIX A

Cite as
147 Utah Adv. Rep. 36

IN THE
UTAH COURT OF APPEALS

The STATE of Utah,
Plaintiff and Appellee,
v.
Darrin Lamar PELTON,
Defendant and Appellant.

No. 890509-CA
FILED: November 9, 1990

Third District, Salt Lake County
Homer F. Wilkinson

ATTORNEYS:

Ronald S. Fujino and Elizabeth A. Bowman, Salt Lake City, for Appellant

R. Paul Van Dam and Charlene Barlow, Salt Lake City, for Appellee

Before Judges Billings, Garff, and Orme.

OPINION

GARFF, Judge:

Defendant, Darrin Lamar Pelton, appeals his conviction of arranging to distribute a controlled substance, in violation of § 58-37-8(1)(a)(ii) (Supp. 1990), arguing that his involvement did not rise to the level of criminal culpability.

FACTS

Both parties generally agree on the facts. Albert Acosta, a narcotics agent, worked with a confidential informant to set up a drug buy through Lorraine Coates, who was to introduce Acosta to a drug dealer, "Paco". Subsequently, pursuant to instructions from another intermediary, Acosta, Chris Baker and the confidential informant picked up defendant. Defendant then told Acosta to drive to a 7-11 store where they were to make a phone call and then "the man would bring the cocaine to that location." At the store defendant and Baker got out of the car and spoke to a man in a telephone booth, who turned out to be Paco. Coates was also present. Acosta told Coates he was uncomfortable with defendant and Baker present, so Coates called Paco over and defendant and Baker left. The drug purchase was later consummated between Paco and Acosta at a different location.

STANDARD OF REVIEW

In reviewing the sufficiency of the evidence at a bench trial, as occurred here, we will not set aside the verdict unless clearly erroneous, and where the result is against the clear weight of the evidence, or we otherwise reach a definite and firm conviction that a mistake has been made. *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); Utah R. Civ. P. 52(a).

Arranging to Distribute

Utah Code Ann. §58-37-8(1)(a)(ii) (Supp. 1990)[1] provides, "it is unlawful for any person to knowingly and intentionally ... arrange to distribute a controlled ... substance." In *State v. Gray*, 717 P.2d 1313 (Utah 1986), the supreme court in interpreting the statute that preceded the above section, stated that "any witting or intentional lending of aid in the distribution of drugs, in whatever form the aid takes, is proscribed by the act. In other words, *any act* in furtherance of arrang(ing) to distribute ... a ... controlled substance' constitutes a criminal offense pursuant to the statute." *Id.* at 1320-21 (emphasis in original) (quoting *State v.Harrison*, 601 P.2d 922, 923-24 (Utah 1979)).

Defendant argues that it was Coates who actually called Paco over to the car and intr-oduced him to Acosta, and that he never possessed the cocaine, never directed Acosta to the house where the cocaine was purchased, was not present when the transaction occurred, and never discussed prices or handled any money. Therefore, defendant argues, he cannot be considered a participant in the arrangement. He cites several cases to support this position: *State v. Renfro*, 735 P.2d 43, 44 (Utah 1987) (defendant discussed the purchase with officers, set a price, and agreed to make the exchange); *State v. Ontiveros*, 674 P.2d 103 (Utah 1983) (court described defendant's activities to be a classic case of arranging when defendant directed an undercover officer to the drug buy location, procured money from the officer, purchased the drugs, and delivered the marijuana to him); *State v. Clark*, 783 P.2d 68 (Utah Ct. App. 1989) (defendant attempted to contact the drug dealer, commented on the quality of the cocaine, was present during the sale negotiations and warned the undercover officer of a tailing car). However, nothing in these cases prevents the inclusion of the acts of defendant within the statutory prohibition.

We conclude that defendant's actions were sufficient to bring him within the proscription of the statute as interpreted by *Gray* and *Harrison*. Defendant was one link in a chain of events, involving six people, which eventually led to the sale of cocaine. There was ample evidence from which the trial court could properly conclude that defendant knew that he would be the triggering mechanism to bringing Acosta and Paco together when he had Acosta drive to the 7-11 store, and that he also knew the transaction involved the sale of cocaine. The fact that Paco was present at the 7-11 store negated the need to make the phone call to have the cocaine delivered. Defendant and Coates each spoke to Paco at the telephone booth. Paco then made contact

with Acosta and subsequently sold him the cocaine. Defendant acted knowingly and intentionally, and he was instrumental in arranging the sale of the cocaine.

Constitutional Application

Defendant also asserts that the arranging statute was unconstitutionally applied to his case. Defendant argues that the supreme court in *State v. Harrison*, by proscribing "any activity," unconstitutionally broadened the application of the arranging statute. The language in question is as follows:

> A statute may legitimately proscribe a broad spectrum of conduct with a very few words, so long as the outer perimeters of such conduct are clearly defined. The statute in question accomplishes this by specifying that *any activity* leading to or resulting in the distribution ... of a controlled substance must be engaged in knowingly or with intent that such distribution would, or would be likely to occur. Thus, any witting or intentional lending of aid in the distribution of drugs, whatever form it takes, is proscribed by the act.

610 P.2d at 923 (emphasis added).

Defendant's argument is that *Harrison* renders the arranging portion of the statute unconstitutionally vague. A law is impermissibly vague when it "fails to give a person of ordinary intelligence fair notice" that a contemplated act is forbidden. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quoting *United States v. Harris*, 347 U.S. 612, 617 (1954)). The underlying principle is that one should not be held criminally responsible for conduct in cases where one could not understand the proscription. *Id.*

In *Harrison* the Utah Supreme Court holds that the arranging statute is such that "[t]he citizen of average intelligence is left with no confusion as to what type of conduct is forbidden " 601 P.2d at 923-24. We see *Harrison* as a legitimate definition of "arrange" as used in Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1989). *Harrison* clarifies rather than confuses the scope of the arranging statute. Thus, totally aside from the conceptual problem presented by this court's presuming to declare that a prior supreme court decision rendered a criminal statute unconstitutional, as defendant would have us do, we find defendant's contention to be without merit.

Affirmed.

Regnal W. Garff, Judge

WE CONCUR:

Judith M. Billings, Judge

Gregory K. Orme, Judge

1. Prior to 1987, arranging for the distribution of a controlled substance, Utah Code Ann. §58-37-8(1)(a)(iv) (1986), was a separate offense from actual distribution. Utah Code Ann. §§58-37-8(1)(a)(ii) (1986), 58-37-8(1)(c) (1986). In 1987, section 58-37-8(1)(a)(ii), as amended, combined the offenses of arranging and distributing into one section. *State v. Clark*, 783 P.2d 68, 69 n.1 (Utah Ct. App. 1989).

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APPENDIX B

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	ORDER DENYING PETITION
	)	FOR REHEARING
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 890509-CA
	)	
Darrin Lamar Pelton,	)	
	)	
Defendant and Appellant.	)	

Before Judges Billings, Garff, and Orme.

THIS MATTER having come before the Court upon Appellee's Petition for Rehearing, filed November 14, 1990,

IT IS HEREBY ORDERED that the Appellee's Petition for Rehearing is denied.

Dated this 28th day of November, 1990.

FOR THE COURT

Mary T. Noonan, Clerk